Supreme Court U.S.
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No. 06- 06-794 DEC 6 - 2006

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IN THE

Supreme Court of the United States

BETTY JEAN BLOCK,

Petitioner,

v.

KELLY SERVICES, INC. and
EXXON MOBIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner, Betty Jean Block, respectfully requests allowance of a writ of certiorari. This appeal addresses compelling issues regarding the scope of protections afforded by 42 U.S.C.A. § 2000e-3(a). Specifically, this appeal presents the following questions for review:

1. Does an employer fail to state a non-retaliatory reason for its adverse employment decision when the employer's reason is based on an employee's breach of an employer directive not to engage in reasonable opposition activity?

2. Does an employer violate Title VII's anti-retaliation provision when it directs the employee not to engage in reasonable opposition activity?

3. Does an employer directive crafted to substantially interfere with an employee's reasonable opposition activity constitute a directive not to engage in reasonable opposition activity?

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas was not selected for publication. The opinion of the United States Court of Appeals for the Fifth Circuit was not selected for publication.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court for the Southern District of Texas decided the questions *sub judice* October 14, 2005. The United States Court of Appeals for the Fifth Circuit entered its decision September 7, 2006.

STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 2000e-3(a).

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment

practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Petitioner Betty Jean Block filed her claim for discrimination and retaliation on June 18, 2004 (R. 8). The district court had jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343 as this suit was brought under federal statutes prohibiting employment discrimination and retaliation for opposing such discrimination. Respondent Kelly Services, Inc. (hereinafter "Kelly Services") filed its answer on August 9, 2004 (R. 32). Kelly Services filed a motion for summary judgment on June 30, 2005 (R. 62); Ms. Block responded on August 12, 2005 (R. 302). No oral hearing was requested or held. Judge John Rainey granted Kelly Services' motion for summary judgment on October 14, 2005 (R. 522, 533). Ms. Block filed a notice of appeal on November 10, 2005 (R. 540).

II. STATEMENT OF THE FACTS

Ms. Betty Jean Block began working for Kelly Services in January 1997 and was assigned to work at Exxon Mobil's Baytown refinery. (R. 108). From February 26, 2001 through July 28, 2003, Block worked as an assistant to Charles McCloskey in the refinery's Chemical Plant garage office. (R. 109, 111, 113). Kelly Services' on-site manager reported that Ms. Block effectively did her job, was a "good employee," and had no disciplinary record whatsoever (R. 499-502).

During the time Block worked at the Chemical Plant garage, a company named Tecom supplied approximately ten of its employees to work in the Chemical Plant garage. (R. 114-115). At one point during Block's assignment at Exxon Mobil, three of these Tecom employees (Jason Howe, Bernardo Ramos and Dean Taylor) each told Block that another Tecom employee (Anthony Taft) was harassing them. (R. 119-122). In response to their complaints, Block sent a note to Mr. McCloskey. (R. 120-123).

On April 14, 2003, another Tecom employee (Keri Joseph) made a complaint about Mr. Taft. Specifically, Block was told by Ms. Joseph that Taft had asked her to go to lunch with him off-site, made a gesture with his hips, and "said something to the effect that he wanted to "get it on" and had been hostile toward her since she rebuffed his advances. (R. 135-136, 194, 212). Block believed Joseph's allegations about Taft to be credible, and she concluded that Taft's conduct constituted sexual harassment. (R. 139, 195-196, 204-205).

Block decided to tell McCloskey about Joseph's situation "off the record" and without mentioning Joseph by name. McCloskey responded by telling Block that there was nothing he could do until the employee came forward herself. (R. 137-138). Moreover, at some point after this conversation, McCloskey told Block "not to have further contact with Tecom employees on that subject...In other words, don't let them come to my office. Send them somewhere else." (R. 150).

After McCloskey's "warning", Block had two additional conversations with Joseph. (R. 151-152). During one of these conversations, Joseph also told Block that no one from Tecom

had contacted her about her complaint. (R. 155, 198-200). Understandably, Block reported to McCloskey that Joseph said that Tecom had not investigated her complaint. (R. 156-158).

On or about June 12, 2003, McCloskey forwarded Block an e-mail written by a Tecom employee named Roberto Ayerdis. In his e-mail, Mr. Ayerdis complained that Block's "apparent dislike and disapproval of [Taft]" was "causing friction in the workplace." (R. 232. *See also* R. 116, 160-161). McCloskey went on to tell Block that Taft had filed a complaint against Block with Exxon Mobil contract administration. (R. 162-164). McCloskey said that Taft claimed Block was spreading rumors about him and had told a security guard about Joseph's harassment complaint. (R. 165). At some point, McCloskey told Block that Ayerdis was upset with Joseph for reporting her concerns directly to Clement and that either Ayerdis or Taft had called Block an "instigator." (R. 168-170). McCloskey then told Block not to make eye contact with Taft during safety meetings, not to show any emotion toward him, to distance herself from the Tecom employees, to limit her discussion with them to business matters, and not to discuss Joseph's sexual harassment complaint with any of them. (R. 164-165, 200).

The day after this conversation, Block sent an email to Julian Lopez (who was at that time Kelly Services' Area Manager) and Connie Schofield, who is Kelly Services' on-site representative at the Baytown refinery. (R. 110, 112, 166). In this e-mail, Block told Mr. Lopez and Schofield about the Joseph sexual harassment complaint, the Ayerdis criticism of her, Taft's complaint against Block, and how Taft tried to bump into her in the hallway. (R. 167-170, 172-174. *See also* R. 233-234).

After receiving Block's e-mail, Schofield called Block to set up a meeting between Block, Schofield and Lopez. (R. 175). During this meeting, Lopez told Block that she was not to have any further discussions about the harassment situation with anyone. (R. 177).

At some point after Block's meeting with Schofield and Lopez, Joseph came into Block's office and told her that she was looking for an attorney, which Block naturally assumed was related to Joseph's sexual harassment allegations against Taft. (R. 178-179). In response, Block looked up the name of an attorney in the phone book, wrote it down and passed the information to Joseph later that day. *Id.* After Block had passed the information to Joseph, Tecom's Human Resources representative (Donna Clement) allegedly called Sharon Cochran (who at the time was the Kelly Services account manager with responsibility for Exxon Mobil) to tell Ms. Cochran that Block "continued to involved herself in Tecom's sexual harassment investigation and, in particular, had approached another employee with the name of an attorney to represent [Joseph]." (R. 83). Ms. Clement told Cochran that "Tecom had handled the complaint," and Block's continuing to discuss it was "causing disruption to the workplace and asked me to put a stop to it." *Id.* After receiving Clement's complaint, Cochran contacted a Kelly Services corporate human resources representative (Shannon Cain). Ms. Cain told Cochran that "if Exxon Mobil confirmed Clement's information about Block's conduct," Cochran could remove Block from the assignment "on the grounds that she had engaged in unprofessional and inappropriate conduct in the workplace." *Id.* Schofield ultimately met with Block, and told her that she was being removed from her assignment at Exxon Mobil for "unprofessional behavior." (R. 182-183).

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD ALLOW THE WRIT TO RESOLVE WHETHER AN EMPLOYER FAILS TO STATE A NON-RETALIATORY REASON FOR ITS ADVERSE EMPLOYMENT DECISION WHEN THE EMPLOYER'S REASON IS BASED ON AN EMPLOYEE'S BREACH OF AN EMPLOYER DIRECTIVE NOT TO ENGAGE IN REASONABLE OPPOSITION ACTIVITY.

A conflict that will unravel the protections provided by 42 U.S.C. § 2000-e 3(a) exists between the Fifth Circuit decision, relevant decisions of this Court, relevant decisions of other circuits, and the fundamental architecture of the statute. The Parties and the Fifth Circuit agree that an employer would violate 42 U.S.C. § 2000-e 3(a) ("Title VII's anti-retaliation provision") if it ordered its employees not to engage in reasonable opposition activity, particularly if the employer then used violation of that order as a basis to terminate the employee for insubordination[1] (*Block v. Kelly Services*, No. 05-209786, slip op. at 5-6 (5th Cir. September 7, 2006); Appellant's Brief to the Fifth Circuit Court of Appeals at 25-27). The Parties and the Fifth Circuit also agree that, under other circumstances, an employee's failure to follow an employer's directive can constitute a legitimate, non-retaliatory reason for an adverse employment decision[2] (*Block v. Kelly Services*, No. 05-209786, slip op. at 5-6 (5th

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[1] This rule seems intuitive; any other interpretation would clearly unravel the statute. However, the Fifth Circuit cites no authority for it and petitioner can locate no authority for it; consequently, this is likely another minor issue to be addressed on appeal.

[2] For purposes of brevity, petitioner has omitted a detailed explanation of the first part of the burden-shifting analysis—

(Cont'd)

Cir. September 7, 2006); Appellant's Brief to the Fifth Circuit Court of Appeals at 25-27). E.g. *Aldrup v. Caldera*, 274 F.3d 282, 286 (5th Cir. 2001); *Chaney v. New Orleans Pub. Facility Mgmt., Inc.*, 179 F.3d 164, 167 (5th Cir. 1999). Consequently, the important question of federal law that needs to be resolved is "When does an employer directive constitute an impermissible order 'not to engage in reasonable opposition activity' and when does it constitute a legitimate directive, the violation of which can form the basis for a non-retaliatory adverse employment decision?"

The Fifth Circuit and District Court held that Kelly Services' directive "not to discuss the Joseph allegation" with Joseph did not amount to a directive not to engage in reasonable opposition activity, and as a result, gave Kelly a legitimate, non-retaliatory reason to make its adverse employment decision (*Block v. Kelly Services*, No. 05-

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(Cont'd)
establishment of the prima facie elements of retaliation—which all parties agree petitioner could meet. The prima facie elements are (1) the plaintiff engaged in an activity that Title VII protects; (2) the defendant carried out an adverse employment action; and (3) a causal nexus exists between the protected activity and the adverse action. *Roberson v. Alltel Information Services*, 373 F.3d 647, 655 (5th Cir. 2004); *Evans v. City of Houston*, 246 F.3d 344, 352 (5th Cir. 2001); *Harvill v. Westward Communications, L.L.C.*, 433 F.3d 428 (5th Cir. 2005); *Chaney v. New Orleans Pub. Facility Mgmt., Inc.*, 179 F.3d 164, 167 (5th Cir. 1999). Instead, petitioner has focused on the second stage of the analysis and the issue *sub judice*, the employer's burden to then articulate a legitimate, non-retaliatory reason for the adverse employment action. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 332 (5th Cir. 2005); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)

209786, slip op. at 5-6 (5th Cir. September 7, 2006); *Block v. Kelly Services*, No. H-04-2326 at 8 (S. D. Tex. Oct. 14, 2005). If allowed to stand, the holding will give employers the power to unilaterally remove Title VII's protection from acts as innocuous as passing an employment attorney's name to a victim of discrimination. This result conflicts with established case law that the statute protects employees helping victims as well as the victims themselves. *Jones v. Flagship International*, 793 F.2d 714, 727 (5th Cir. 2005) (Title VII's anti-retaliation protection covers "employee opposition to discriminatory employment practices directed against a fellow employee," even where the employee engaging in the opposition activity is mistaken and no discrimination occurred); *Doe v. AFL-CIO, Dept. of Organization, Region 6, Atlanta, Georgia*, 405 F.Supp. 389 (N.D.Ga.1975), *affirmed*, 537 F.2d 1141, *certiorari denied*, 97 S. Ct. 1127, 429 U.S. 1102, 51 L.Ed.2d 552 (employee protected from telling other employees about his beliefs concerning employer's alleged discrimination). Employers will simply craft their directives, and employment policies, to interfere with employees' reasonable opposition activities, i.e. direct their employees not to talk to the victim of a particular incident, as was done to Block and Joseph. Employers could also craft directives at levels of generality or vagueness that would have the same effect, i.e. "limit your conversations with the victim to business matters only," as was done to Block and Joseph.

The Fifth Circuit holding conflicts with this Court's policy of affording broad protection to workers seeking to assert their rights against discrimination and those seeking to assist those people. In June of this year, this Court wrote, "Title VII *depends for its enforcement* upon the cooperation of employees who are willing to file complaints and act as

witnesses. 'Plainly, effective enforcement could thus *only be expected* if employees felt free to approach officials with their grievances.'" *Burlington N. & S. F. R. Co. v. White*, 126 S. Ct. 2405, 2414 (2006) (Slip Opinion No. 05-259 at 12) (Quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)) *emphasis added.* "Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *Id.* If simply providing the name of an attorney to an alleged victim of sexual harassment is deemed unreasonable, unprotected opposition activity, it is hard to imagine what activity will then qualify for protection. A finding that leaves Mrs. Block's actions unprotected will have the exact kind of chilling effect the Supreme Court seeks to avoid with the broad statements it made in *Burlington N. & S. F. R. Co. v. White.*

The Fifth Circuit opinion also conflicts with the holdings of other circuits in that no other case has ever found such innocuous behavior unprotected. For instance, Ms. Block did not repeatedly become loud and disruptive over a period of months, resulting in multiple disciplinary suspensions. *Gonzalez v. Bolger*, 486 F. Supp. 595 (D.C. Dist. Col. 1980). Ms. Block did not disclose any of her employer's confidential matters without authorization. *Hochstadt v. Worvester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976). Ms. Block did not make frequent, specious or abusive grievances against her superiors. *Robbins v. Jefferson County School District R-1*, 186 F.3d 1253 (10th Cir. 1999). Ms. Block did not confront and berate her superiors in front of others, or disrupt the work of others. *Matima v. Celli*, 228 F.3d 68 (2nd Cir. 2000); *Pendleton v. Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980) (employee's demonstration in food

service area of a hospital not protected opposition activity where he was warned that any such demonstration would disrupt the feeding of patients). Ms. Block's actions regarding Ms. Joseph's harassment complaint in no way compromised her job performance. *Rosser v. Laborers' International Union, Local 438*, 616 F.2d 221 (5th Cir. 1980) *cert. denied*, 449 U.S. 886, 101 S. Ct. 241, 66 L.Ed.2d 112 (1980). Ms. Block did not repeatedly leave her work area without permission and interrupt conferences and meetings of managerial personnel. *Garrett v. Mobil Oil Corp.*, 531 F.2d 892 (8th Cir. 1976).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 7, 2006

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-20978
Summary Calendar

BETTY JEAN BLOCK,

Plaintiff-Appellant,

v.

KELLY SERVICES, INC.; Et Al,

Defendants,

KELLY SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas
(4:04-CV-2326)

Before DAVIS, WIENER, and BARKSDALE, Circuit Judges.

Appendix A

PER CURIAM:*

Betty Jean Block appeals the summary judgment awarded Kelly Services, Inc. Block claims Kelly Services violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by taking adverse employment actions against her in retaliation for assisting a Tecom employee with a sexual harassment claim when Block and the Tecom employee were placed at Exxon Mobil. **AFFIRMED.**

I.

Block began working for Kelly Services, a temporary staffing agency, in 1997 and was assigned to work at an ExxonMobil refinery. From March 2001 through July 2003, she worked as administrative assistant to Charles McClosky, Exxon's Manager of the Training/Maintenance Department. While Block did so, Tecom, an onsite maintenance contractor, supplied ten of its employees to work at Exxon. Block, who never worked for Tecom or Exxon, had no authority over the Tecom employees; she was, however, responsible for reporting to McClosky any problems she saw or that were brought to her attention by Tecom employees.

Several Tecom employees individually told Block they were being harassed by Anthony Taft, another Tecom employee. Block stated McClosky encouraged her to bring forward such complaints and that no adverse employment

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

action was taken when she did so. In April 2003, Keri Joseph, another Tecom employee, complained to Block she was being harassed by Taft. (Joseph was the fourth Tecom employee to do so.)

As she did for the previous three complaints, Block forwarded Joseph's complaint to McClosky. He told Block to inform Joseph (whose identity McClosky did not yet know) that she could talk to him about the issue. Block also twice emailed Tecom's human resources representative about Joseph's allegation; that representative informed Block she would handle the incident going forward. In addition, McClosky: updated Block regarding steps he had taken to handle the situation; and told Block not to have further contact with Tecom employees regarding the Joseph incident.

Block then had two more conversations with Joseph about the incident. During the first conversation, Joseph told Block no one from Tecom had contacted her, which Block reported to McClosky. McClosky told Block Tecom had assured him the company investigated the matter but could not substantiate Joseph's allegation. He also told Block a Tecom employee had filed a complaint with Exxon, alleging Block was spreading rumors about Taft. She was again told not to discuss the Joseph matter.

The next day, Block first contacted Kelly Services about the matter, reporting both Joseph's harassment claim and Taft's claim about Block. Block then met with the Kelly Services area manager and its Exxon on-site representative. They told her: she should have reported the incident to them sooner; and it was not appropriate to contact another

company's human resources department. Block was told not to discuss the Joseph matter with anyone and not to contact the Tecom human resources department again.

Sometime after that meeting, Joseph informed Block she was seeking legal advice. Block then looked up the name of a lawyer in the telephone directory and provided it to Joseph. After admitting to Kelly Services supervisors she had given Joseph the name of an attorney, Block was removed from her assignment at Exxon for unprofessional conduct.

In June 2004, Block filed this action against Exxon and Kelly Services. Kelly Services moved for summary judgment in June 2005. In September 2005, Block settled with Exxon. Kelly Services was granted summary judgment in October 2005.

II.

A summary judgment is reviewed *de novo* under Federal Rule of Civil Procedure 56, using the same standard as the district court. *See, e.g.*, ***Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.,*** 289 F.3d 373, 376 (5th Cir.2002). Such judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed.R.Civ.P. 56(c). Evidence is viewed in the light most favorable to the non-movant. *E.g.*, ***Kee v. City of Rowlett,*** 247 F.3d 206, 210 (5th Cir.), *cert. denied,* 534 U.S. 892, 122 S.Ct. 210, 151 L.Ed.2d 149 (2001). If a plaintiff fails to prove

an essential element of his claim, summary judgment must be granted. *E.g.*, ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The non-movant may not rest on the pleadings, but rather must provide specific facts showing the existence of a genuine issue for trial. *E.g.*, ***Ragas v. Tenn. Gas Pipeline Co.,*** 136 F.3d 455, 458 (5th Cir.1998).

To establish a Title VII retaliation claim, Block must first establish a prima facie case, showing that: (1) she engaged in protected activity; and (2) her employer took adverse employment action against her (3) because of that activity. *See* ***Burger v. Cent. Apt. Mgmt., Inc.,*** 168 F.3d 875, 878 (5th Cir.1999). As it did in district court, Kelly Services concedes Block could establish a prima facie case.

Therefore, Kelly Services must demonstrate a legitimate, non-discriminatory reason for Block's termination. ***Shackelford v. DeLoitte & Touche, LLP,*** 190 F.3d 398, 404 (5th Cir.1999). If it meets its burden, the burden returns to Block to prove the proffered reason was a pretext, or, although not pretext, was only one of the reasons she was fired, another being her protected activity. ***Rachid v. Jack in the Box, Inc.,*** 376 F.3d 305, 312 (5th Cir.2004).

Obviously, insubordination can serve as a legitimate reason for an employer to take an adverse employment action against an employee. *E.g.*, ***Aldrup v. Caldera,*** 274 F.3d 282, 286 (5th Cir.2001). And, for summary-judgment purposes, the evidence establishes such action was taken against Block for failing to follow orders to stop discussing the Joseph allegation because it was being investigated by others.

As the district court noted, an employer would, of course, violate Title VII if it ordered its employees not to raise Title VII violations and then took an adverse employment action against those who disobeyed that order.

Here, however, Kelly Services is not seeking to avoid liability for Title VII by simply ignoring violations and ordering its employees to do the same. As the district court also noted, when it was within Block's job responsibilities, she reported multiple harassment complaints without adverse consequences to her (including first reporting Joseph's complaint). It was only after ignoring directives that she no longer discuss the Joseph situation because it was being handled by others that Kelly Services, as a contractor seeking to avoid interfering with other contractors, removed Block from her position at Exxon.

It was unreasonable for Block to pursue the Joseph allegations *after* she was: (1) informed others were handling the investigation; and (2) directed not to talk about the matter. *See* ***Douglas v. DynMcDermott Petroleum Operations Co.,*** 144 F.3d 364, 373 (5th Cir.1998), *cert. denied,* 525 U.S. 1068, 119 S.Ct. 798, 142 L.Ed.2d 660 (1999) (balancing Title VII interests with those of employer and holding conduct unprotected where plaintiff-attorney's otherwise protected conduct involved breach of professional duties as attorney). Kelly Services has therefore demonstrated a legitimate, non-discriminatory reason for removing Block from ~~her~~ assignment at Exxon.

Accordingly, the burden shifts to Block to demonstrate that reason was pretextual or part of a mixed-motive for Kelly Services' decision. In the light of the summary-judgment record, Block fails to do so.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION FILED OCTOBER 14, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-04-2326

BETTY JEAN BLOCK

Plaintiffs,

v.

KELLY SERVICES, INC., and,
EXXON MOBIL CORPORATION

Defendants.

MEMORANDUM & ORDER

Pending before the Court is Defendant Kelley Services, Inc.'s Motion for Summary Judgment (Dkt.# 20). The Court, having considered the motion, Plaintiff's response, and the applicable law, is of the opinion that the motion for summary judgment should be GRANTED.

Factual and Procedural Background

Plaintiff, Kelley Jean Block, began working for Defendant, Kelley Services, Inc., a temporary staffing agency,

in January 1997 and was assigned to ExxonMobil's Baytown refinery. Her last assignment, which lasted from approximately March 2001 to July 28, 2003, was in the refinery's Chemical Plant garage office where she was an Administrative Assistant to ExxonMobil employee, Charles McClosky, Manager of the Training/Maintenance Department. During this period, a company named Tecom, an onsite maintenance contractor, also supplied approximately ten of its employees to work in the Chemical Plant garage. It is undisputed that Plaintiff, who did not work directly for either Tecom or ExxonMobil at any point, had no authority over the Tecom employees, but rather, Plaintiff's position largely involved clerical and administrative tasks, and also the observation of Tecom employees. In particular, with regard to the Tecom employees, Plaintiff was to report back to McClosky any problems that she saw or that were brought to her attention.

Several times during Plaintiff's employment in the Chemical Plant garage, Tecom employees told her that they had been subject to inappropriate conduct. Specifically, three Tecom employees, Jason Howe, Bernardo Ramos, and Dean Taylor, each told Plaintiff that another Tecom employee, Anthony Taft, was engaging in harassing conduct. In each instance, Plaintiff sent a note to McClosky to inform him of the complaints, but did not inform Defendant. Additionally, on two separate occasions Taft had complained to Plaintiff about the actions of two other Tecom employees, who had allegedly made inappropriate comments and/or engaged in inappropriate conduct. Plaintiff also relayed these reports to McClosky and was subsequently questioned as a witness regarding these allegations. It is apparently undisputed that

no adverse employment action was taken against Plaintiff as a result of reporting any of these concerns to McClosky, and, in fact, Plaintiff states that McClosky encouraged her to bring such concerns to him.

On April 14, 2003, Keri Joseph, another Tecom employee, complained to Plaintiff that Taft had asked her to go to lunch with him, made a gesture with his hips, "said something to the effect that he wanted to 'get it on,'" and had been hostile toward her since she rebuffed his advances.[1] Plaintiff apparently concluded that the allegations were credible and that the conduct constituted sexual harassment. Plaintiff relayed the information to McClosky without specifically identifying Joseph by name, at which point McClosky responded by telling Plaintiff that there was nothing he could do until the employee came forward herself. The next morning, McClosky told Plaintiff to make sure that Joseph, as yet unidentified to McClosky, knew that she could come to him regarding the issue.

After Plaintiff had initially reported the situation to McClosky, Plaintiff decided to send an e-mail to Donna Clement, Tecom's Human Resources representative, on behalf of Joseph. Clement responded that Plaintiff should encourage the employee to contact her directly. Thereafter, Plaintiff sent Clement a second e-mail in which she identified Joseph and Taft as the individuals involved. Clement responded that she would handle the complaint from that point forward, which Plaintiff understood to mean that

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1. Dkt. # 21, Ex. 1, pp. 73-74.

Clement "took it out [Plaintiff's] hands."[2] McClosky also reported back to Plaintiff that he had reviewed ExxonMobil's harassment policy, reported the situation to his supervisor, and sought the assistance of another ExxonMobil employee with regard to the complaint. At this point, McClosky also instructed Plaintiff "not to have further contact with Tecom employees on that subject. . . ." After this instruction, Plaintiff had two additional conversations with Joseph.

During one of these conversations, Joseph told Plaintiff that no one from Tecom had contacted her about the complaint. Plaintiff reported this to McClosky, who subsequently told Plaintiff that someone from Tecom had assured him that the company had conducted an investigation, could not substantiate Joseph's claims, and concluded the matter. On June 12, 2003, McClosky forwarded an e-mail to Plaintiff from Roberto Ayerdis, another Tecom employee. In the e-mail, Ayerdis complained about Plaintiff's apparent dislike and antagonism toward Taft. McClosky indicated that Ayerdis had filed a complaint against Plaintiff with ExxonMobil contract administration, and when Plaintiff laughed in response, McClosky told her that it was a "serious" matter. McClosky further explained that Taft claimed Plaintiff was spreading rumors about him and had told a security guard about Joseph's harassment complaint. McClosky then told Plaintiff not to make eye contact with Taft during safety meetings, not to show any emotion toward him, to distance herself from Tecom employees, to limit her discussions with them to business matters, and not to discuss the Joseph situation with anyone.

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2. *Id.* at p. 84.

The next day, Plaintiff contacted Defendant for the first time regarding the matter. Specifically, Plaintiff sent an e-mail to Julian Lopez, Defendant's then Area Manager, and Connie Schofield, Defendant's on-site representative at the refinery, in which she reported the Joseph sexual harassment complaint and the Taft complaint against her. Plaintiff also alleged that she believed that Taft had attempted to bump her in the hallway. After receiving the e-mail, Schofield called Plaintiff to set up a meeting between herself, Plaintiff, and Lopez. At the meeting, Plaintiff further descirbed the Joseph complaint and also that she had contacted Clement directly. Lopez told Plaintiff that she should have contacted Defendant sooner and that it was not appropriate to contact another contractor's human resources representative. After confirming that Plaintiff would feel comfortable returning to her work assignment, Lopez told Plaintiff that she was not to have any further discussions about the alleged harassment with anyone, especially Tecom employees, and not to contact anyone in Tecom human resources again.

After this meeting, Joseph came into Plaintiff's office and told Plaintiff that she was looking for an attorney, which Plaintiff assumed was related to Joseph's sexual harassment claim against Taft. In response, Plaintiff looked up the name of an attorney in the phone book, wrote it down, and passed the information to Joseph later that day. Afterwards, Clement allegedly called Sharon Cochran, who at the time was Defendant's account manager with responsibility for ExxonMobil, to tell Cochran that Plaintiff continued to involve herself in Tecom's sexual harassment investigation and, in particular, that Plaintiff had approached another employee with the name of an attorney to represent Joseph.

Cochran then requested that Schofield confirm whether Plaintiff had continued to discuss the Joseph complaint. After McClosky confirmed to Schofield that Plaintiff was, in fact, discussing the situation with Tecom employees, Schofield met with Plaintiff again. During this meeting, Schofield asked Plaintiff if she had given Joseph the name of an attorney, and Plaintiff admitted that she had. Schofield then removed Plaintiff from the ExxonMobil assignment for unprofessional conduct.

On June 18, 2004, Plaintiff commenced this lawsuit against both Defendant and ExxonMobil. In her complaint, Plaintiff alleges that Defendant and ExxonMobil retaliated against her for assisting an employee in reporting sexual harassment in violation of Title VII of the Civil Rights Act of 1964. Defendant filed its motion for summary judgment on June 30, 2005, to which Plaintiff responded on August 12, 2005. Thereafter, Plaintiff's claims against ExxonMobil were dismissed with prejudice by agreement on September 29, 2005.[3]

Summary Judgment Standard

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Christopher Village, LP v. Retsinas,* 190 F.3d 310, 314 (5th Cir.1999). "For any matter on which

3. Dkt. # 38.

the non-movant would bear the burden of proof at trial . . . , the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Transamerica Ins. Co. v. Avenell,* 66 F.3d 715, 718-19 (5th Cir.1995); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To prevent summary judgment, the non-movant must "respond by setting forth specific facts" that indicate a genuine issue of material fact. *Rushing v. Kansas City S. Ry. Co.,* 185 F.3d 496, 505 (5th Cir.1999).

When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in favor of the non-movant. *See Samuel v. Holmes,* 138 F.3d 173, 176 (5th Cir.1998); *Texas v. Thompson,* 70 F.3d 390, 392 (5th Cir.1995). "The court may not undertake to evaluate the credibility of the witnesses, weigh the evidence, or resolve factual disputes; so long as the evidence in the record is such that a reasonable jury drawing all inferences in favor of the nonmoving party could arrive at a verdict in that party's favor, the court must deny the motion." *Int'l Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1263 (5th Cir.1991). However, the non-movant cannot avoid summary judgment by presenting only "conclusory allegations," or "unsubstantiated assertions," such as the bare allegations of a complaint, but must present sufficient evidence, such as sworn testimony in a deposition or affidavit, to create a genuine issue of material fact as to the claim asserted. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (en banc).

Appendix B

Discussion

Defendant argues that there is no evidence that its decision to remove Plaintiff from her position was motived by retaliatory animus. Rather, Defendant contends that it removed Plaintiff because of a legitimate, non-discriminatory reason. In particular, Defendant contends that it removed Plaintiff from her position because Plaintiff continued to unnecessarily and inappropriately involve herself in another contractor company's handling of a harassment complaint after officials from ExxonMobil and Defendant specifically instructed her not to do so. In response, Plaintiff first attacks Defendant's legitimate, non-discriminatory reason as pretextual, and further maintains that her claim survives under the "mixed-motive" model because there is direct evidence that Defendant's decision to remove Plaintiff resulted from her opposition to unlawful employment activities. The Court addresses these issues below.

In order to prove a retaliation claim under Title VII, a plaintiff must establish that (1) the employee has engaged in protected activity, (2) the employer took adverse employment action against the employee, and (3) a causal connection exists between that protected activity and the adverse employment action." *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir.1999). Under this Court's view of current Fifth Circuit precedent, once a plaintiff sets forth this prima facie case,

> [T]he defendant then must articulate a legitimate, non-discriminatory reason for its decision . . .; and, if the defendant meets its burden of

> production, the plaintiff must then offer sufficient evidence . . . either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic (mixed-motive[s] alternative).

Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir.2004) (internal quotation marks and citations omitted).[4]

For purposes of its motion, Defendant concedes that Plaintiff can establish her prima facie case of retaliation. Therefore, the Court begins its inquiry with whether Defendant has met its burden of producing a legitimate, non-discriminatory reason for its decision. In order to satisfy its burden, Defendant explains that it removed Plaintiff from her ExxonMobil assignment because she failed to follow instructions given to her regarding communications with

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4. Although the Fifth Circuit's decision in *Rachid* involved an age discrimination claim under ADEA, several courts have since concluded that this "modified McDonnell Douglas approach" articulated in *Rachid* also applies to retaliation claims under Title VII. *See, e.g., Warren v. Terex Corp.*, 328 F.Supp.2d 641, 646 (N.D.Miss.2004) (applying mixed-motive analysis to retaliation claim); *Bergen v. Continental Cas. Co.*, 3:04-CV-0428-H, 2005 WL 292426, at *4 (N.D.Tex. Feb.7, 2005) (same); *Cones v. Duke Energy Corp.*, 367 F.Supp.2d 1092, 1100 (S.D.Tex.2005) (same). This Court concurs with the view expressed by these courts. Thus, despite Plaintiff's argument that direct evidence supports application of the mixed-motive analysis, in fact, the presence of direct evidence is not necessary to apply the mixed-motive standard.

Tecom employees. Specifically, Defendant points to Plaintiff's admission that even after McClosky told Plaintiff to limit her communications with Tecom employees to business only and not to discuss the Joseph claim or investigation, Plaintiff continued to participate in additional conversations with Joseph. Moreover, Defendant notes that Plaintiff looked up and provided Joseph the name and telephone number of an attorney despite the fact that Lopez and Schofield had reiterated that Plaintiff was not to discuss the harassment claim.

In response, Plaintiff disputes that Defendant's "failure to follow orders" justification can serve as its legitimate, non-discriminatory reason. If Defendant's argument were to prevail, according to Plaintiff, employers could avoid the retaliation provisions of Title VII by simply ordering their employees not to oppose or complain about any Title VII violations. The Court disagrees. First, any attempt by an employer to discipline an employee for violating such an order would clearly violate Title VII. Second, in the case at bar, the Court does not construe Defendant's or ExxonMobil's directives to Plaintiff as orders not to oppose or complain about the alleged harassment. Instead, it appears undisputed that Plaintiff reported the Joseph complaint, as well as other complaints, without incident. Indeed, Plaintiff appears to suggest that such reports were encouraged. The adverse employment action came only after Plaintiff continued her involvement in the situation after repeatedly being instructed not to do so because it was being handled by the third-party contractor. Because it is clear that a failure to follow orders can serve a legitimate, non-discriminatory reason, the Court concludes that Defendant has satisfied its

burden. *See, e.g., Aldrup v. Caldera,* 274 F.3d 282, 286 (5th Cir.2001) ("The failure of a subordinate to follow a direct order of a supervisor is a legitimate nondiscriminatory reason for taking adverse employment action.").

The burden now shifts to Plaintiff to offer sufficient evidence either (1) that Defendant's reason is not true, but is instead a pretext for discrimination, or (2) that Defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is Plaintiff's protected activity. Plaintiff has not met either standard. Although Plaintiff states that "the evidence clearly demonstrates" pretext, Plaintiff does not directly identify any evidence that she relies upon for this conclusion. Instead, Plaintiff seems to rely solely on the undisputed facts and circumstances surrounding her removal, which Plaintiff contends demonstrate that she suffered an adverse employment action as a result of her actions opposing the alleged Title VII violation. Plaintiff, however, construes too broadly the scope of protection provided under Title VII for opposition activity.

Under Title VII, an employee has engaged in protected activity if he or she has (1) "opposed any practice made an unlawful employment practice by this subchapter," or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). Plaintiff, of course, claims protection under the opposition prong. Assuming that all of Plaintiff's actions constitute opposition activity,[5] the Court notes that "[n]ot all activities

5. The Court notes that it is not completely convinced that all of Plaintiff's actions qualify as opposition activity, particularly her (Cont'd)

taken in opposition to an employer's perceived discriminatory practices . . . remain insulated from reprisal under Title VII's shield." *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 373 (5th Cir.1998). Indeed, the Fifth Circuit has "recognized that some conduct, even though engaged in with the most sincere of intentions, may be so inappropriate as to justify the curtailment of statutorily-afforded safeguards." *Id.* (citing *Jones v. Flagship Int'l*, 793 F.2d 714, 727 (5th Cir.1986). As such, the court advised that "the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare." *Id.* at 374-75 (citations and internal quotations omitted).

In this case, it is clear that Plaintiff's actions in initially reporting the alleged harassment of Joseph to McClosky represents opposition activity entitled to Title VII protection. Additionally, Plaintiff had relayed other concerns on behalf of different Tecom employees to McClosky on several occasions. There is no evidence, however, to support any claim that Defendant retaliated against Plaintiff for these actions. In fact, it appears undisputed that Defendant was not aware of Plaintiff's reporting of the Joseph incident until sometime later because she did not inform Defendant of the situation until a complaint had been made against her by Taft. Even after Defendant was made aware of Plaintiff's involvement with Joseph, there is nothing that suggests that it retaliated or intended to retaliate against Plaintiff, despite

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(Cont'd)

continued involvement in the Joseph situation after the appropriate information had already been conveyed to the appropriate officials, and Plaintiff had been instructed not to further involve herself.

Appendix B

Defendant's clear expressions to Plaintiff that she should not have contacted another contractor's human resources department. Yet despite Defendant's instructions not to continue discussions with Tecom employees regarding the Joseph matter,[6] as well as two similar warnings by McClosky, Plaintiff proceeded to provide the name and number of an attorney to Joseph. In light of these clear instructions, Plaintiff's awareness that the information had already been conveyed to the appropriate officials and that an investigation had commenced, and Defendant's position as a contractor seeking to avoid interference with other third-party contractors, the only conclusion that can be drawn is that Plaintiff's conduct after the initial reporting was unreasonable. Therefore, Plaintiff's removal was justified. As such, summary judgment is appropriate.

Conclusion

For the reasons set forth above, the Court is of the opinion that Defendant's Motion for Summary Judgment should be GRANTED.

It is so ORDERED.

s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

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6. Although Plaintiff suggests that passing information to Joseph would not constitute "discussion," the Court finds Plaintiff's argument unpersuasive. It is clear to the Court that Plaintiff understood from ExxonMobil and Defendant's instructions that she was not to interact further with Tecom employees regarding the Joseph situation.